JAN 12 2001

No. 99-2036

Supreme Court, U.S.
FILED
JAN 12 2001
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

THE GOOD NEWS CLUB; ANDREA FOURNIER; and DARLENE FOURNIER,

Petitioners,

—v.—

MILFORD CENTRAL SCHOOL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN JEWISH CONGRESS IN SUPPORT OF RESPONDENT

MARC D. STERN
AMERICAN JEWISH CONGRESS
15 East 84th Street
New York, New York 10028
(212) 360-1545

January 2001

BEST AVAILABLE COPY

TABLE OF CONTENTS and AUTHORITIES

AUTHORITIES CITED iii

INTEREST OF THE *AMICUS* vi

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. CONTROLLING CIRCUIT PRECEDENT LIMITED THE SCOPE OF THE LITIGATION 4

II. A NOMINALLY PRIVATE SPEAKER IS NOT AUTOMATICALLY IMMUNE FROM CONSTITUTIONAL SCRUTINY WHEN ITS SPEECH HAS A CONNECTION TO GOVERNMENT 6

A. Introduction 6

B. Speech May Be Neither Distinctly Public Nor Private 7

C. This Court Has Rejected A Rigid Public Private Dichotomy In Religious Speech Cases 8

III. THE DISTINCTION BETWEEN CONTENT AND VIEWPOINT DISCRIMINATION IN A DESIGNATED PUBLIC FORUM IS STILL VALID 11

A. An Exclusion Of Religious Speech Is A Subject Matter Distinction 11

B. The Distinction Between Subject And Viewpoint Discrimination Is Both Sensible And Workable 15

IV. NO EVIDENCE SUPPORTS PETITIONERS' CLAIM OF EXCLUSION BASED ON DISAGREEMENT WITH THEIR RELIGIOUS PURPOSE 17

A. Non Constitutional Claims May Support Subject Matter Restrictions 17

B. Petitioners Have Not Proved Discrimination Because Of Disapproval Of Its Proselytizing 18

C. An Application For Access Must Be Judged When And As Made 19

V. MILFORD WAS ADVANCING A SUBSTANTIAL INTEREST IN TURNING DOWN PETITIONERS' APPLICATION 23

A. Exclusions Of Religious Speech Will Not Always Pass Muster 23

B. Respondents Had Substantial Establishment Clause Concerns 25

VI. THE RELEVANT AUDIENCE FOR ASSESSING REASONABLENESS ARE FIRST THROUGH SIX GRADERS 27

CONCLUSION 30

Authorities Cited

Cases

American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1940) 7

Blum v. Yaretsky, 457 U.S. 991 (1982) 8

Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990) 1, 10, 27, 29

Bowen v. Roy, 476 U.S. 693 (1985) 14

Bronx Household of Faith v. CSD #10, 127 F.3d 207 (2nd Cir. 1997) 4, 12

Calash v. City of Bridgeport, 788 F.2d 80 (2nd Cir. 1986) .. 4

Campbell v. St. Tammany's School Bd., 206 F.3d 482 (5th Cir. 2000) 12

Capital Square Review & Advisory Board v. Pinette, 515 U.S. 753 (1995) 1, 8-9, 10, 25

City of Madison v. Wis. Emp. Rel. Comm., 429 U.S. 167, 180 (1976) 20, 22

Cornelius v. NAACP LDEF, 473 U.S. 788 (1985) 12

County of Allegheny v. ACLU, 492 U.S. 573 (1989) 10

County of Allegheny v. ACLU, 492 U.S. 573 (1991) 1

Crawford-El v. Britton, 523 U.S. 574 (1998) 16

Cuffley v. Mickes, 208 F.3d 702 (8th Cir. 2000) 11

Deeper Life Christian Fellowship v. Bd. of Educ., 852 F.2d 676 (2nd Cir. 1988) 4, 12

DiLoretto v. Downey USD, 196 F.3d 958 (9th Cir. 2000) . 12

Edwards v. Aguillard, 487 U.S. 578 (1987) 28

Ellison v. Dixon, 349 U.S. 458 (1955) 6

Evans v. Newton, 382 U.S. 296, 299 (1966) 8

Grove v. Mead School District, 753 F.2d 1528 (9th Cir. 1985) 22-23

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988) 11

Knights of the KKK v. Curators, 203 F.3d 1085 (8th Cir. 1999) 11

Lamb's Chapel v. Center Moriches UFSD, 508 U.S. 384 (1993) 1, 4, 24

Lynch v. Donnelly, 465 U.S. 668 (1984) 25

McCollum v. Bd. of Educ., 333 U.S. 203 (1948) 24

Perry Educ. Ass'n v. Perry Local Education Ass'n, 460 U.S. 37 (1983) 12, 20

Police Department v. Mosley , 408 U.S. 92 (1968) 12

REA v. N.Y., 336 U.S. 102 (1949) 16

Resnick v. East Brunswick Bd. of Ed., 77 N.J.2d 88, 389 A.2d 944 (1978) 24

Roemer v. Bd. of Public Works, 426 U.S. 736 (1976) ... 27

Rosenberger v. Rector, 515 U.S. 819 (1995) 2, 12, 13

Santa Fe ISD v. Doe, 120 S.Ct. 2230 (2000) 7

Travis v. Osego Apalachin District, 927 F.2d 688 (2nd Cir. 1995) 4

Treitly v. Board of Education, 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978) 23

Walz v. Tax Comm'rs, 397 U.S. 664 (1970) 26

Widmar v. Vincent, 454 U.S. 263 (1981) 7, 26

Other Authorities

Equal Access Act, 20 U.S.C.§ 4071, *et seq.* ... 3, 10, 28, 29

Matter Bd. of Educ. of the City School District of the City of Buffalo, 21 Educ. Dept. Report 585 (1982) 23

N.Y. Education Law § 414 ..... 6, 23

INTEREST OF THE AMICUS

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, economic, political and religious rights of American Jews, and all Americans. It has taken a particular interest in the Religion Clauses of the First Amendment and, has filed briefs in most of the cases reaching this Court under those Clauses.

The brief is filed with the consent of the parties.

SUMMARY OF ARGUMENT

1. The record was compiled with recent controlling decisions of the Second Circuit in view. Both the School District in passing on Good News' application and counsel defending its actions understandably did not undertake any broader defense of Good News' exclusion. However, numerous other factual and legal defenses do exist and should not be ignored because under controlling law it was unnecessary to reach those issues.

2. Contrary to Petitioner's model, speech is not either private or public. Although usually the identity of the speaker will suffice to determine if speech is to be attributed to the government for Establishment Clause purposes, there are cases such as this one, *Capital Square Review & Advisory Board v. Pinette*,515 U.S. 753 (1999), *County of Allegheny v. ACLU*, 492 U.S. 573 (1991) and *Board of Education v. Mergens*, 496 U.S. 226 (1990), where the reasonable observer will believe that it is the state, not the private party, speaking, even though the actual speaker is private. As with state action generally, the complexity and ambiguity of relations between private and public actors yields no bright line between public and private. Adoption of Petitioners' bright line would be unfaithful both to this Court's precedents and to reality.

3. The Second Circuit was faithful to this Court's precedents both in classifying an exclusion of all religious speech as a subject matter, not viewpoint based, decision, and in permitting a designated forum to exclude speech based on its subject matter. *Lamb's Chapel v. Center Moriches* UFSD, 508

U.S. 384 (1993) and *Rosenberger v. Rector*, 515 U.S. 819 (1995), both retain the distinction between subject matter and viewpoint based distinctions. Other circuits agree with the Second Circuit, post *Rosenberger*.

4. That distinction is sensible and workable. Common human practice groups related ideas into subjects. Intelligible conversation would be impossible without the ability to classify ideas as related. The use of subject matter classification is routine (*i.e.*, in grouping college courses into departments), and in no way is a hindrance to speech.

5. Subject matter restrictions are not automatically acceptable. They must be reasonable, necessary to preserve the forum for its intended purposes, and not exclude substantially more speech than necessary. All exclusion of religious speech will not satisfy that standard. Had Good News sought Milford's building at nights or on weekends, it would not have been reasonable to exclude it on the basis of the subject matter of its speech, there being then no plausible claim of confusion of the Club with the School.

6. Contrary to Petitioners' claim, nothing in the record supports the claim that the ostensibly content based exclusion was in fact a viewpoint based one. In particular, Respondent was entitled to grant or withhold access based on Petitioners' application, which described their purpose as religious. There is no basis in law or reason to impose on government entities the burden of determining whether any of possible multiple characterizations of speakers' content overlaps with the viewpoints actually expressed by other users. Petitioners' claim that, notwithstanding their application describing only pure

religious instruction, they too were teaching about moral and spiritual values is untenable. Not only did they not say anything of the sort in their application, but a review of materials used in the Club show only religious teaching, not secular subjects taught from a religious point of view.

7. Respondent's concerns about confusion in the minds of first through sixth graders were substantial. The Club would meet on school property immediately after school, and conduct activities which were not unlike regular school classes.

These claims may, as some of our fellow *amici* argue, amount to a constitutional violation had Good News been granted access. This case does not require the Court to go so far. Nothing in the Court's cases requires a party burdened to prove a substantial or compelling interest that the interest is of constitutional magnitude. Compelling (or substantial) interest analysis is not an exercise in reconciling conflicting constitutional provisions, but tempering respect for rights with the practical necessities of governance. Those necessities incorporate room for judgment by school officials about how much overlap between school and church activities is educationally desirable.

Petitioners' argument that private speech can never justify special restrictions on religious speech would invalidate those provisions of the Equal Access Act, 20 U.S.C. § 4071, which impose special restrictions on religious clubs, and which limit the Act's provision to secondary (as opposed to elementary) school students.

ARGUMENT

I. CONTROLLING CIRCUIT PRECEDENT LIMITED THE SCOPE OF THE LITIGATION

Governing law in the Second Circuit when Good News applied to use Milford's facilities, and when this case was submitted to the District Court, allowed subject matter restrictions on limited public forums. It treated a ban on religious speech as a permissible subject matter restriction. Speech about secular subjects from a religious perspective is illicitly viewpoint based. *Lamb's Chapel v. Center Moriches UFSD*, 508 U.S. 384 (1993); *Bronx Household of Faith v. CSD #10*, 127 F.3d 207 (2nd Cir. 1997); *Travis v. Osego Apalachin District*, 927 F.2d 688 (2nd Cir. 1995); *Deeper Life Christian Fellowship v. Bd. of Educ.*, 852 F.2d 676 (2nd Cir. 1988);*Calash v. City of Bridgeport*, 788 F.2d 80 (2nd Cir. 1986) (rock concert).

The School Board in its decisionmaking and its counsel in preparing for trial understandably focused on the rule of *Bronx Household*, which both parties earlier agreed would likely be determinative of this case. (See letter of Norman Gross to Thomas Marcelle, Lodging, T-1 and T-2, and Marcelle's response, *id.* at V-1 and V-2). While other facts now loom large here, Respondent's attorney marshaled only those facts necessary to prevail under *Bronx Household*.

Counsel did not explore the temporal boundaries of the forum. The parties likewise left unexamined the question of whether the forum designated all after school time as the forum, or only some segments of after school time. Did other clubs, and particularly the clubs which Good News insists are most

like it, meet immediately after school? Would Good News dominate the forum at the time it proposed to meet?

Counsel for neither side adduced proof whether other categories of speech, such as political speech or commercial speech, speech urging alcohol or drug use or promoting sexual activity by minors, would also have been excluded from the Milford schools. The parties also had no occasion to explore what public school activities were occurring when Good News sought to meet.

Counsel had no reason to explore these questions. Controlling case law made them superfluous. A busy district judge, bound by a controlling and recent circuit decision, had even less reason to ask these questions.

This Court reviews less than two percent of all the cases presented to it. Why should a school board cast a decision other than in terms of controlling circuit precedent? How could counsel justify to his client or its insurance company the expense of litigating this case beyond what was demanded by binding Circuit precedent? If this Court changes the legal rules governing this dispute, it should not foreclose the possibility that the way the case appears is not an accurate reflection of reality, and that the School District indeed acted legally.

If any party here should bear the burden of failure to anticipate review in this Court, it is Petitioners. They could not prevail under Second Circuit law. For them, review in this Court was the only hope for relief. It is they who bear the burden of upsetting Respondent's lawful decision.

This Court so held in previous litigation over the scope of a school board's authority to exclude speech pursuant to

N.Y. Education Law § 414, *Ellison v. Dixon*, 349 U.S. 458 (1955). This Court there dismissed certiorari as improvidently granted where those seeking access had not compiled an adequate record to permit this Court to determine the existence of viewpoint discrimination. Although *Amicus* believes the judgment should be affirmed, should this Court reverse, it should at least allow exploration of those so far unexplained questions.

II. A Nominally Private Speaker Is Not Automatically Immune from Constitutional Scrutiny When Its Speech Has A Connection to Government

A. Introduction

Petitioners argue for reversal based on a set of simple and for the most part uncontested propositions. They insist that Good News is formally private. We agree. Petitioners contend that private religious speech is unrestricted by the Establishment Clause. We agree. They contend that religious speech is at the epicenter of constitutionally protected speech. We again agree.

Petitioners contend that the court below erred in distinguishing between religious worship and religious instruction. We agree, although we believe that both are again distinguishable from religious speech about secular subjects.

Good News insists that because it is formally private, the School District's refusal to grant access to its forum is impermissible and unjustifiable viewpoint discrimination against religious speech. We disagree, because (1) the fact that Good News is private is not alone determinative; (2) the

distinction drawn was subject, not viewpoint, based and; (3) the District had sufficient and adequate reasons not to permit Petitioners to meet immediately after school.

B. Speech May Be Neither Distinctly Public Nor Private

The universe of speech constructed by Petitioners is bipolar, with private and public speech at opposite poles. In between, they create a vacuum. On this model, it is easy to decide whether speech threatens to establishes religion. A speaker must be either governmental or private. If the former, the Establishment Clause is implicated, *Widmar v. Vincent*, 454 U.S. 263 (1981). If the latter, there can be no Establishment Clause violation. *Santa Fe ISD v. Doe*, 120 S.Ct. 2230 (2000). Because the Good News club is private, Petitioners insist that exclusion of its speech cannot be justified under the Establishment Clause. It follows, they say, that the exclusion is unjustifiable discrimination against religious speech.

This simplistic model will not do. The Establishment Clause is not the only justification for content-based discrimination against religious speech, *infra*, at page 18. Second, mechanical and formalistic approaches cannot delineate the boundary between state and private action in this or other contexts.

The complexity and ambiguity of the modern state calls for a more flexible doctrine, one recognizing that there is no unyielding and invariable 'bright line' between public and private. *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999). The welfare and regulatory state engages in complex and varied relationships with the private sector. It owns,

controls and regulates large numbers of public spaces. Under these circumstances it is often difficult to distinguish between the actions of the state and the actions of those who, although intertwined with the state in relationships of various degrees of intensity, retain their private character. Although "conduct that is formally 'private' may become so entwined with governmental characters that it can be regarded as governmental action," *Evans v. Newton*, 382 U.S. 296, 299 (1966), not every contact with government converts private into state action, *Blum v. Yaretsky*, 457 U.S. 991 (1982).

Just as formally privateness is not alone determinative of state action in other constitutional contexts, *Evans*, *supra*, formal privateness is not determinative of whether speech is private or governmental. The polarities of private and public speech exist, and in most, but not all, cases control. While Petitioners' private/public model has the advantage of simplicity and clarity, like all simplistic dichotomies, theirs does irreparable harm to sound decision making.

C. This Court Has Rejected A Rigid Public Private Dichotomy Religious Speech Cases

The either-or ascription of speech to government or private speakers is not novel. It was urged by a plurality in *Capitol Area Review and Advisory Committee v. Pinette,* 515 U.S. 753 (1995), speaking through Justice Scalia.

Rejecting Justice Scalia's stark dualism, a majority insisted there were cases in which a speaker was formally private, but in which circumstances were such that the reasonable observer would conclude (even if wrongly) that the speech was the government's and therefore subject to

Establishment Clause constraints, *id.*, 515 U.S. at 776-78 (O'Connor, J., concurring); *id.* at 785-86 (Souter, J., concurring); *id.* at 799 (Stevens, J., dissenting); *id.* at 817-18 (Ginsburg, J., dissenting). These Justices did not deny that formal privateness would usually control; they contended only that it would not always control.

In *Pinette*, Klan sought to erect a large Latin cross on the grounds of the Ohio statehouse. Both the cross and its disreputable sponsor were formally private. Ohio insisted that the erection of the Klan's large and prominent cross would dominate the horizon and create a reasonable, if mistaken, impression in the public's mind that the cross was the state's and that the state had thereby endorsed Christianity.

Although seven Justices in the end concluded that tolerating the Klan's cross would violate the Establishment Clause, a different majority concluded that it did not do so simply because the cross and the Klan were private. As Justice O'Connor put it in her concurrence:

> Where the government's operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result ... the Establishment Clause is violated. This is so not because of "'transferred endorsement,'" ... or mistaken attribution of private speech to the State, but because the State's own actions (operating the forum in a particular manner and permitting the religious expression to take place therein), and their relationship to the private speech at issue, *actually convey* a message of endorsement.

515 U.S. at 717 (citations omitted; emphasis in original). Compare *id.* at 802-08 (Souter, J., concurring).

Pinette is not the only case involving speech of ambiguous provenance to be treated by this Court as subject to constitutional constraints. In *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), this Court considered a creche erected by the Knights of Columbus on the Allegheny County courthouse staircase. Again, the fact that the speech was formally private proved no a barrier to application of Establishment Clause restraints. Under the circumstances there presented, the nominally private religious speech was reasonably understood by the public as government's speech. See *Pinette*, *supra*, 515 U.S. at 787 (Souter. J., concurring); *id.* at 777 (O'Connor, J., concurring).

Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990), also did not adopt Petitioners' rigid private-public dichotomy. The Equal Access Act ("EAA") created a federally designated limited public forum for private student clubs. On Petitioners' theory, this Court should have dismissed out of hand the School District's claim that the EAA established religion.

Mergens did not follow that tack. Instead, the Court carefully examined all the facts and circumstances, concluding that the clubs were not only private, but would be perceived as private by the relevant 'public' of other students. *Westside Board of Education v. Mergens*, *supra*, 496 U.S. at 250-53.

Although the distinction between public and private speech has arisen most often in the Establishment Clause arena, it has arisen elsewhere as well. *Hazelwood School District v.*

Kuhlmeier, 484 U.S. 260 (1988), recognized that schools have a legitimate interest in avoiding close association with controversial private speech. There, the Court was not concerned with official school speech, but private student speech whose publication in a student newspaper might be reasonably attributed by other students or the taxpaying public to the school district.[1] Here, too, school officials had ample reason to fear a confusion of private speech with official sanction.

III. THE DISTINCTION BETWEEN CONTENT AND VIEW POINT DISCRIMINATION IN A DESIGNATED PUBLIC FORUM IS STILL VALID

A. An Exclusion Of Religious Speech Is A Subject Matter Distinction

The parties agree that a public school is not a traditional public forum. The court below evaluated this case under the standards applicable to a limited designated public forum, a well settled sub-category of designated public forum recognized by the Second Circuit.

---

1. The Courts of Appeal have likewise wrestled with the difficulty of categorizing speech in which private and public intersect in the context of speech suggesting approval of racism. Thus, the Eighth Circuit has wrestled with the question of whether signs announcing participation in the Adopt-A-Highway program is public or private speech, or whether sponsorship announcements on public radio are those of the state or the sponsor. *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000), petition for cert. pending; *Knights of the KKK v. Curators*, 203 F.3d 1085 (8th Cir. 1999).

The Second Circuit has interpreted cases such as *Perry Educ. Ass'n v. Perry Local Education Ass'n*, 460 U.S. 37 (1983) and *Cornelius v. NAACP LDEF*, 473 U.S. 788 (1985), as holding that a public body need not open a designated public forum for speech on the entire universe of subjects of human interest. When designating a forum, it may impose reasonable subject matter limitations on access. It may not, however, impose such restrictions on an *ad hoc* basis after the designated forum is created. *Deeper Life Christian Fellowship*, *supra*, 852 F.2d at 680. The Second Circuit reasons that since the governmental unit is under no obligation to designate the forum, it can open it for less than all topics. Petitioners do not quarrel with this rule.

The Second Circuit treats restrictions on all religious speech as a subject matter, not viewpoint, classification. *Bronx Household of Faith*, *supra*; *Deeper Life*, *supra*. Petitioners insist that the exclusion of the subject of religion is necessarily viewpoint discrimination. The distinction between viewpoint and content based discrimination is concededly often elusive, although "viewpoint discrimination is ... an egregious form of content discrimination," *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995). But if Petitioners are right, the distinction between the two collapses.

The Second Circuit's treatment of restrictions on religious speech as subject matter ones is not unique. The Ninth and Fifth Circuits agree. *DiLoretto v. Downey USD*, 196 F.3d 958 (9th Cir. 2000); *Campbell v. St. Tammany's School Bd.*, 206 F.3d 482 (5th Cir. 2000). *Lamb's Chapel* carves out an exception to that: a school district cannot ban speech from

religious viewpoints concerning otherwise permissible secular subjects. *Lamb's Chapel* pointedly did not hold that any ban on pure religious speech would be viewpoint discrimination.

Petitioners argue that if *Lamb's Chapel* left unanswered the question of whether religious exclusions were permissible, *Rosenberger v. Rector*, *supra*, "slammed the door shut" (Brief at 16-20) to any claim that in creating a limited public forum one can exclude religion from the list of permissible subjects. Although *Rosenberger* contains some language which might be so construed, 515 U.S. at 831, the opinion as a whole does not sustain this reading. *Rosenberger* was at pains to note that the magazine addressed a wide variety of topics addressed by funded 'secular media,' and those topics were broader than just religious teachings, 515 U.S. at 831, a holding precisely tracking the holding in *Lamb's Chapel*.

Rosenberger also noted that the publisher of the magazine was not a church or other religious institution. That caveat, repeated twice in the opinion, 515 U.S. at 840 and 844, and echoed by Justice O'Connor in her concurrence, *id.* at 850, is inconsistent with equating content and viewpoint based discrimination. If religious speech can never be treated differently than secular speech, those caveats were not just gratuitous. They were wrong. The Fifth and Ninth Circuits in post-*Rosenberger* decisions (*DiLoretto* and *Campbell*, *supra*) agree that the door was not slammed shut in *Rosenberger*, and that restrictions on religious speech are subject matter ones.

Although religion may well color one's entire world view, such that for some believers there is nothing but religion, the same is and was true of politics, communism, feminism or

Aristotelian philosophy. It does not follow that the subjective perspective of those who see the world from a unitary perspective should control the categories of constitutional law. The state must not punish people for, nor dissuade them from, viewing the world unitarily. However, neither the government to be compelled to view the world in the same way. *Cf.*, *Bowen v. Roy*, 476 U.S. 693 (1985) (believer had no right to force religious views on internal operations of government). If subject restrictions of religion are viewpoint based, then these other ones are as well.

Professor Laycock urges (Brief at 14-17) that applied to religious speech any distinction between subject and viewpoint is incoherent and should be abandoned. "Nearly all believers," he says, "think that their faith has implications for their morals and for other issues in their life." But what Professor Laycock says of religion is equally true of politics (*i.e.*, Communism), aesthetics, or any other comprehensive ideological view of the world.

One's views on tax cuts, sexual equality, or abortion are not easily divorced from one's views about humanistic or theistic ethics, private capital, or party affiliation. If there is no coherence to the content-subject matter distinction in religion, it is hard to see it as coherent in any other category of speech. Government may no more silence political than religious speech. So long as the Court distinguishes between content and viewpoint, there is no justification for singling out religion as an exception.

B. The Distinction Between Subject And Viewpoint Discrimination Is Both Sensible And Workable

The distinction between subject matter and viewpoint discrimination is commonsensical. A subject matter exclusion encompasses an entire area of knowledge or thought; viewpoint restrictions single out a single perspective, and ban it from the forum, distorting the discussion of an otherwise permissible subject. Subject matter restrictions are far less likely to create this danger.

Humans routinely classify knowledge by grouping a range of related ideas under subject matter headings. In settings as familiar as college faculties and academic departments, bookstores, public libraries and the programs of municipal theater companies, such classifications are routine, uncontroversial and proven not to be obstacles to full and vigorous exchange of ideas. On the contrary, without the ability to broadly classify ideas into comprehensible subjects, intelligent and intelligible conversation would be drowned in a wave of unrelated ideas.

The Constitution, with its special provisions regarding religion, proceeds on the assumption that it is possible, desirable and sometimes imperative, to characterize some human activities, ideas and concepts as uniquely religious. That classification does not inherently convey a message that religion is more or less important than any another subject. Rather, it embodies the judgment that religion is different and that it is useful to group common ideas as religious in an effort to address what is unique about those ideas.

Where properly justified, subject matter restrictions do not distort the marketplace of ideas. The government may not exclude religious ideas (or any other subject) because it wishes to suppress them. It may, as the Respondent did here, reasonably exclude them to preserve a property for its intended uses or for other legitimate reasons.

Viewpoint discrimination represents a presumptively invalid departure from the requirement of equal treatment of ideas. The justification for tolerance for reasonable content based distinctions and the intolerance for viewpoint based ones was aptly stated by Justice Jackson in *REA v. N.Y.*, 336 U.S. 102, 112 (1949). "There is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." In a content based restriction, all who wish to speak on a subject are excluded. The majority must accept the same denial of access as the minority. If the majority is unwilling to be excluded, the minority is assured access to the forum.

A different case would be presented if a subject matter restriction was intended to suppress a particular viewpoint. Professor Laycock in his brief *amicus curiae* posits the case of a Southern town creating a designated limited public forum, but excluding race as a permissible subject matter. That, he says, would really be a not-so-subtle viewpoint discrimination.

Even if such a rule would not be invalidated by an improper motive to suppress speech critical of the racial status quo, see, *Crawford-El v. Britton*, 523 U.S. 574 (1998), it would not necessarily be valid. By analogy to *Lamb's Chapel*, such a

rule could probably not exclude a discussion of improving education by integrating schools. Most important, subject matter limitations are not automatically acceptable. Such distinctions must still be reasonable,[2] necessary to preserve the property for its intended uses, and crafted so as not to exclude substantially more speech than necessary to preserve property for its intended uses. Those are substantial protections, alone and together.

IV. No Evidence Supports Petitioners' Claim Of Exclusion Based On Disagreement With Their Religious Purpose

A. Non Constitutional Claims May Support Subject Matter Restrictions

Petitioners proceed as if the only defense to a claim of content discrimination is a complete violation of the Establishment Clause. They cite no authority for this proposition. We think it is flat out wrong. The need to preserve the facilities for their intended use formulation, see, e.g., *Perry*, allows the School District charged by state law with the task of setting these purposes leeway beyond what the Constitution itself requires. Those reasons may be sufficient without amounting to a full blown constitutional violation.

Nothing in the standard for sustaining subject matter (or, for that matter, viewpoint) restrictions limits the universe of

---

2. Application of the more stringent compelling interest standard would have the effect of collapsing content and viewpoint discrimination into one standard, since both would be judged by the identical legal test.

acceptable justifications to the need to avoid constitutional violations. Compelling interest analysis is not an exercise in resolving conflicting constitutional provisions. Rather, it is a method of resolving the tension between constitutional values and the practical necessities of governance. Only overarching values ought to trump constitutional rights, but those values need not be of constitutional magnitude. One searches this Court's compelling interest (or intermediate scrutiny) cases in vain for a hint of the idea that only constitutional claims count.

B. Petitioners Have Not Proved Discrimination Because Of Disapproval of Its Proselytizing

Beyond their general equation of a religious exclusion with viewpoint discrimination, Petitioners contend that their exclusion was viewpoint based because the Respondent objected to their particular "religious purpose" (Brief at 20). Nothing in the record supports the claim that Petitioners' evangelizing purpose was the cause of their exclusion. No evidence demonstrates that Respondent disapproved of Good News' belief that a "challenge to Christians and an invitation to believe to non-Christians are integral elements of a Christian viewpoint." (*Id.* at 21-22).

There is no record evidence to sustain a finding that a less "aggressive" religious club would have been permitted to meet. Respondent was happy to bus children to the club's meetings so long as there was room on the buses. The practice ended only when bus routes became unavailable for reasons unrelated to Good News' beliefs. (App. P; Deposition of Stephen Fournier, at pp. 11-12; 31).

C. An Application For Access Must Be Judged When And As Made

Perhaps sensing that this argument cannot be sustained, Petitioners resort to a different tack. They insist, though, that Respondent should not be permitted to judge them by their stated purpose. (Good News' application stated that it sought space for religious purposes.) Instead, they claim, Respondent should be required to ignore this self-categorization, and engage in a retrospective, comparative, re-characterization of its activities to determine if Petitioners were competing with other groups functioning in the forum. Petitioners argue that their speech could be multiply labeled (Brief at 23-24); theirs was not only religious speech, but speech about morals as well. Since in its view other groups allowed access taught morality, it follows its exclusion was illicit viewpoint discrimination.

Petitioners' application announced that it sought to engage in religious instruction. (Lodging, W-1). When asked to detail its program, Good News described just such a program. As far as school officials knew, they were making a subject matter, not viewpoint, decision. Public must decide applications for access to a forum based on what they are told. They have neither the ability nor the time to monitor every use of a forum to determine whether the group's post admission activities parallel (by any of multiple characterizations) a denied group's program. Petitioners' argument would require officials superintending a forum to engage in ongoing surveillance of speakers, a requirement not conducive to freedom of speech.

Petitioners refer to the forum as one "by practice" to "youth organizations for the purpose of developing children's

moral and spiritual character" (Brief at 23-36), citing to various documents in the Lodging, many of which are cursory and general assertions in affidavits and others of which are promotional materials published by the national or regional headquarters of groups given access to the Milford Schools.

Neither New York law, Milford regulations, nor Milford's letter to Petitioners denying their application (Lodging, V1-1), use the phrase for "moral or spiritual training." That is a category wholly of Petitioners' creation.

A limited designated public forum exists only by virtue of the conscious decision of the owner of the property (not outsiders seeking to use the property) to devote it to certain speech purposes. If the owner may open a designated forum only for limited purposes, it must judge applications by what purposes are proposed. *Perry Educational Ass'n v. Perry Local Educator's Ass'n, supra*; *City of Madison v. Wis. Emp. Rel. Comm.*, 429 U.S. 167, 180 (1976) (Stewart, J., concurring). Respondent chose to create the limited designated forum authorized by this law. Because it is the District's intentions which count, Petitioners should not be empowered to recast the forum as they see fit.

But Petitioners say since other groups which engage in what they characterize as instruction in the moral and spiritual development of youth (including the Boy Scouts, Girl Scouts and Little League) do meet, it follows that Good News was excluded from the forum because it would bring a religious point of view to that enterprise. They strive mightily to bring themselves within *Lamb's Chapel* by asserting that they, like

the Scouts, wish to discuss social and moral issues, except that they wish to do so from their own religious point of view.

In its application, all the School District had before it when it first acted, Good News made no reference to "moral and spiritual" training, but described its purposes as "singing songs, hearing Bible lessons, and memorizing scripture (Lodging W-1). *Id.* at X-1 (describing Good News Clubs generally). The Club provided a similar, but more detailed, description when asked for additional description. (Lodging AA-1 - 4). Again no mention was made of "moral and spiritual" training.

Of course, one can discuss moral issues from a religious point of view. Assuming any distinction between religious and secular speech can survive, distinguishing between religious catechesis (the Good News Club) and interjecting religious views into a general debate about social issues (*Lamb's Chapel*) ought to be that distinction. The point is not, as the *amicus* theologians would have it, that the School District ignores or condemns believers' dependence on revelation for moral guidance. It is that the speaker's motivations do not control the boundaries of the forum.

A review of the materials used by Petitioners' volunteers shows nothing on any secular issue discussed from a religious point of view. Its invocation of *Lamb's Chapel*'s "religious viewpoint on secular subjects" rubric is a *post hoc* manipulation of the record, forcing religious catechesis into a Procrustean bed of public debate. Good News discusses religious issues from a religious perspective only. Its programs are nothing more than mid-week Sunday School lessons.

Petitioners' revisionist position is most strikingly illustrated by their description of the Little League as an organization dedicated to teaching values from a competing secular point of view. (App. C3, ¶ 18). Any organized activity has rules (*e.g.*, it is forbidden to intentionally 'bean' a batter), and, presumably therefore, some incidental effect of teaching "morals and spiritual values." Granted, hitting a home run or pitching a no-hitter is an uplifting experience, perhaps even a spiritual one, but Little League coaching is not fairly described as moral or spiritual instruction. To categorize the Little League as an institution whose purpose is to teach moral and spiritual values is to make forum analysis into a trivial word game. "Calling a thing by a name does not make it so." *City of Madison, supra*, 429 U.S. at 174.

The Girl or Boy Scouts might present a closer case had Petitioners offered proof describing the time these groups met and their actual activities. All that is in the record are national policy statements, which may or may not reflect actual practice in Milford (Y-1 - Y-3; Z-2, AA1-5).

Petitioners' viewpoint discrimination argument is at bottom based again on a constitutionally false dichotomy. There is, in Petitioners' Manichean view of the world, the anti-religious and the religious. On this theory, the exclusion of religion is always impermissible, necessarily conveying a viewpoint of hostility and denigration of religious points of view. They cannot conceive of any middle ground position, one which neither denigrates nor endorses religion. That, however, is not the scheme the Constitution contemplates. *Cf., Grove v.*

Mead School District, 753 F.2d 1528 (9th Cir. 1985) (Canby J., concurring).

Students do not perceive a message of Marxist hostility toward capitalism from § 414's ban on commercial activity. N.Y. Educ. Law § 414; *Matter Bd. of Educ. of the City School District of the City of Buffalo*, 21 Educ. Dept. Report 585 (1982) (excluding commercial uses from scope of § 414). It is equally possible that students see the no religious speech rule as nothing more than a rule of etiquette for public education. Religion is valued, but its public expression is not appropriate at every time and place.

V. MILFORD WAS ADVANCING A SUBSTANTIAL INTEREST IN TURNING DOWN PETITIONERS' APPLICATION

A. Exclusions Of Religious Speech Will Not Always Pass Muster

The requirement that content based limitations on the scope of a designated forum be acceptable is not absolute. The restriction must be reasonable, necessary to preserve the forum for its intended use, and not prohibit substantially more speech than is appropriate to achieve those ends. Like limitations on the time, place or manner of speech, these qualifications are not mere rhetorical covers to prettify suppression.

Treitly v. Board of Education, 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978), construes Education Law § 414 to ban all religious uses of school facilities. It does not distinguish between programs immediately after school and those at other times. Applied broadly, *Treitly* fails even the most relaxed test for content based discrimination. It is sufficient to note that a

decision to exclude all religious speech at all times from public school buildings would be far broader than necessary to preserve the forum for its intended purpose.

Religious programming scheduled other than immediately after school, and targeted at the community at large will generally not interfere with the educational purposes of the forum. There is no realistic possibility of confusing after hours use by one of many non-school uses with the school, especially when no school activities are occurring simultaneously, cf. *Lamb's Chapel*, *supra*; *Widmar v. Vincent*, *supra*. If held other than (as here) immediately after school, any impact of the compulsory education laws is also dissipated by the need for a separate decision to return to the school. *Cf. Lynch v. Donnelly*, 465 U.S. 668 (1984); *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948)

Long before the public forum doctrine matured, state courts routinely rejected claims that weekend and evening rentals of school buildings for religious purposes violated the Establishment Clause. See, e.g., *Resnick v. East Brunswick Bd. of Ed.*, 77 N.J.2d 88, 389 A.2d 944 (1978); *Lamb's Chapel v. Center Moriches School District*, *supra*, unanimously dismissed the claim that if the school were to allow religious viewpoints to be heard on its premises on weekends, there would be a violation of the Establishment Clause. That reasoning would control in most cases other than those immediately after school. It does not follow from this that the Respondent had no reasonable concerns in this case.

B. Respondent Had Substantial Establishment Clause Concerns

Petitioners dismiss any Establishment Clause defense citing *Rosenberger* and *Lamb's Chapel*. Those cases are, as we will show below, wholly different from this case. While it may be that, as some of our fellow *amici* contend, the District in fact would have established religion had it granted Good News' request, this Court need not decide that question. Since, as we have established, *supra*, at p. 18, good cause for a subject matter exclusion need not be justified by the need to avoid a formal constitutional violation, it should suffice that Respondent had substantial concerns in this regard.

Free speech protections are not irrelevant to religious speech. Religious speech is not second class speech. *Pinette*, *supra*. But it is not irrelevant the Club's religious speech was to take place on government property. If non-establishment is not a license to censor religious speech on an *ad hoc* basis, neither is freedom of speech grounds for requiring Respondent to balance itself exactly at the precipice of the church-state abyss.

Had Respondent concluded that reasonable elementary school students would understand that the Good News Club was private, and that the school was indifferent as to their participation, its decision to permit the Club to meet (with appropriate safeguards, including parental consent and disclaimers of public sponsorship, and a ban on teacher participation) might withstand Establishment Clause attack.

Conversely, though, if school officials conclude, as Milford's did, that first through sixth graders would mistake as

publicly sponsored a class in religion held in a public school classroom immediately after school, using instructional methods not markedly different from the school's regular instruction, at a time when school activities are still taking place, students are gathered in that place through force of the compulsory education laws, and when the Club would dominate the forum, that judgment is also entitled to deference.

Principles governing the separation of church and state, embodied most prominently in the Establishment Clause, are not merely technical legal doctrines, with meanings as precise and channeled as the provisions of the Uniform Commercial Code. Rather, they give enforceable legal form to public policies broader than the law alone. While local officials cannot sink below the floor set by the Clause, there is "room for play in the joints," *Walz v. Tax Comm'rs*, 397 U.S. 664 (1970), sufficient to allow school officials to decide that a buffer period between the end of school and the use of its facilities by religious clubs ought to stand.

Some leeway with regard to the possible meaning of the Establishment Clause is not the same as any colorable or not so colorable Establishment Clause claim. Not every hypothetical or far-fetched argument about the Clause will sustain the exclusion of speech. This was true of the University of Missouri's claim in *Widmar v. Vincent*, 454 U.S. 263 (1981), that allowing student religious clubs to meet in unused college classrooms would violate the state constitution. The proposed use took place at night, long after classes were over and the students were of college age, whom this Court has long held are far less susceptible to confusing religious indoctrination with

instruction. *Roemer v. Bd. of Public Works*, 426 U.S. 736 (1976).

Similarly, in *Lamb's Chapel*, the religious uses occurred on weekends when school was not in session, the program was not directed at school children and did not emulate regular school instruction. In each of these cases, nothing resembling an Establishment Clause problem, or for that matter confusion between the public and the private, was shown.

That this rule allows school officials to exercise discretion is not grounds to reject it. The articles suppressed in *Hazelwood* could have been tolerated by school officials. No law required suppression. *Hazelwood*'s upholding their exclusion necessarily recognizes discretionary authority for school officials to determine access to its fora to avoid confusing private and public speech.

VI. THE RELEVANT AUDIENCE FOR ASSESSING REASONABLENESS ARE FIRST THROUGH SIX GRADERS

Pinette teaches (though without a conclusive answer) that in considering the possibility of confusing state and private speech, the courts must identify the reasonable viewer, and assess the question from her point of view.

The relevant reasonable observers who might mistake school toleration of religion in this case for school sponsorship are not school officials, citizens at large, nor parents. The relevant audience here is the school population, as it was in *Mergens*, *supra*. In Milford's one-building school, this audience ranges from high school seniors to kindergartners.

The Club itself targets an audience of elementary school students, aged roughly 6-12. That is, as this Court has recognized over and over again, an impressionable age audience. *Edwards v. Aguillard*, 482 U.S. 578 (1987) (collecting cases).

A reasonable adult or adolescent can tell the difference between school-sponsored and school-tolerated activities. *Mergens*, *supra*. But first graders? It is not credible to argue, as Petitioners must, that first graders have the same reasoning ability to discern the difference between school-sponsored and school-tolerated events as adolescents or college students. (We are likewise skeptical of Petitioners' unsupported claim that first graders would on their own conclude that the absence of a religious club immediately after school manifested hostility toward religion.) School officials could reasonably conclude that they could not, and that any effort to explain the difference would be futile, contrary to Petitioners' confident, if uninformed, judgment that such explanations would be effective (Brief at 35).

This reasoning cannot be repelled by arguing down from *Widmar* and *Mergens* (Brief at 31-35). *Widmar* held that college students can discern the difference between school-sponsored and school tolerated; *Mergens*, relying on a congressional fact finding that adolescents in high school could make the same distinction as their slightly older peers, upheld the Equal Access Act. Apparently, if B is almost A, and C is almost B, C equals A. Not so, neither in math nor in law.

No congressional fact finding supports the extension of that level of discernment to elementary school students as the

Equal Access Act supports the extension of *Widmar* to high school students. The original bill which became the Act initially applied to both elementary and secondary schools. Coverage of elementary school was dropped because Congress could not conclude that elementary school students could make the relevant distinction. Petitioners' arguments overrule this congressional limitation, and would necessarily extend the Act's coverage to elementary schools. Petitioners' argument fails not because of a fear of starting down the slippery slope. It is the bottom of the slope.

Petitioners' argument simply equating religious speech with secular speech invalidates much of the Equal Access Act. The Act guarantees equal access to all secondary student clubs regardless of their subject matter. However, the Act imposes at least one special restriction on religious clubs. School personnel may not participate in religious club meetings. They are free to participate in other meetings (20 U.S.C. 4071(c)(3)).

In upholding the constitutionality of the Act, this Court cited this provision as evidence that no student could possibly mistake the club's activities for those of the school. 496 U.S. at 251. Yet on Petitioners' theory, the participation of a school official in an after school club, initiated by students and voluntarily attended, should not create any Establishment Clause problems, and this section would be unconstitutional. Far from invalidating this restriction, the Court read it (in the face of arguably permissive language, see *Mergens*, *supra* 496 U.S. at 259-60 (Kennedy J, concurring)) as mandatory.

Petitioners' error is the same here as elsewhere. They simply ignore the possibility that the Establishment Clause

imposes special requirements on government to avoid partnerships with religion. That is not hostility to religion, but a constitutionally sanctioned time, place or manner restriction. That requirement authorizes limitations on government involvement with religious speech in ways that its involvement with other kinds of speech is not limited.

The obligation is not by any means unlimited. But excluding religious clubs from the shoulder period immediately after school is a permissible means of government avoiding confusion of constitutional dimension.

CONCLUSION

For the reasons stated, the judgment should be affirmed. In the alternative, the case should be remanded for further fact finding.

Respectfully submitted,

Marc D. Stern
American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 360-1545

January 2001